CHONG SIEW CHOONG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK ISHAK J
[MISC. CRIMINAL APPLICATION NO. 44-11 OF 1996]
6 MAY 1996

CRIMINAL PROCEDURE: *Trials - Trials in High Court - Trial of case slotted before a particular Judge of High Court - Whether could be transferred out to another High Court by another High Court Judge - Distribution of cases among High Court Judges - Whether absolute prerogative of the Chief Judge - Courts of Judicature Act 1964 s. 20.*

CRIMINAL PROCEDURE: *Intitulements - Miscellaneous criminal application - Whether to be properly intituled - Failure of applicant to cite relevant sections of the law in intitulement - Practical effect - Whether application liable to be dismissed.*

The applicant is a remand prisoner charged tentatively with murder under s. 302 Penal Code read with s. 34 thereof. On 12 June 1995 the learned Magistrate transmitted the case for trial to one of the three High Courts in Johor Bahru (i.e.Court 1) vide Criminal Trial No. 45-7-95. As it was, the three High Courts in Johor Bahru were manned by three different High Court Judges respectively. On 23 January 1996, in an attempt to get an early trial, the applicant's Counsel wrote to the learned Judge of Court 1, in effect asking for an early hearing and giving several reasons therefor. On 31 January 1996, the relevant Senior Assistant Registrar replied the letter, stating that Court 1 could not give an early date unless the Deputy Public Prosecutor (DPP) agreed to amend the charge to one under s. 304 of the Penal Code, and that Counsel should therefore refer the matter to the learned DPP. Instead of heeding the advice, however, Counsel approached High Court no. 2 (Court 2) and applied, by way of miscellaneous criminal application, for an order that Criminal Trial no. 45-7-95, which was slotted before Court 1, be given an early hearing, that if Court 1 could not give an early trial the case be transferred to Court 2, and consequently, if Court 2 could not give an early trial, the case be transferred to the third High Court. Before the learned Judge the primary question that arose was whether the learned Judge of Court 2 could, in the circumstances and in law, accede to the application.

Held:

[1] Being the Judge assigned specifically to preside over Court 2 and to handle cases alloted thereto by the registries, I am not supposed to encroach into the territory, so to speak, of the Judges of Court 1 or Court 3.

[2] Section 20 of the Courts of Judicature Act 1964 gives an absolute power to the Chief Judge to distribute "business" among Judges of the High Court. The word "business" in this section must necessarily refer to the "cases" filed before the High Courts as the hearing of such cases are the only "business" conducted by these High Courts. Consequently, as a High Court Judge, I have no power to transfer Criminal Trial no. 45-7-95 either from Court 1 to Court 2 or from Court 2 to Court 3. That power only lies with the Chief Judge.

[3] Just like originating summonses that have to be intituled, so too would miscellaneous criminal applications. Such applications require an intitulement which must state, with sufficient particularity, the statute or sections of the law under which the Court is being moved failing which the applications were liable to be dismissed.

[4] The inherent powers of the High Court cannot be exercised to override or circumvent the express provisions of law. In the circumstances I cannot therefore override or circumvent s.20 of the Courts of Judicature Act. This being the case, Counsel's argument that this Court could deal summarily with this criminal application vide its inherent power is untenable and must necessarily fail.

[Application dismissed].

Cases referred to:
King Emperor v. Abhairaj Kinwar [1940] AIR. Oudh 8; 40 Cr. LJ 840 ***(refd)***
Capper v. Baldwin [1965] 2 QB 53 ***(refd)***
*Barnes v. Jarvis [1953] 1 WLR 649 (DC)****(cit)***
Warburton v. Loveland [1832] 2 D & C (HL) 480, 489 ***(cit)***
Attorney-General v. Sillem [1864] 2 H & C 431, 510 ***(cit)***
Attorney-General v. Noyes [1881] 8 QBD 125 ***(cit)***
Hornsey LB v. Monarch Investment Building Society [1889] 24 QBD ***(cit)***
M'Cowan v. Baine [1891] AC 401 ***(cit)***
Salomon v. Salomon [1897] AC 22 ***(cit)***
Sutters v. Briggs [1922] AC 1 ***(cit)***
I.R.C. v. Collco Dealings; IRC v. Lucbor Dealings [1959] 1 WLR. 995 ***(cit)***
Gluchowska v. Tottenham Borough Council [1954] 1 QB 439 (DC) ***(cit)***
A.K. Gopalan v. The State of Madras [1950] AIR. SC 27 ***(refd)***
Bird v. Jones [1872] 7 QB 742; 15 LJ QB 82 ***(cit)***
Cheow Chew Khoon @ Teoh Chew Khoon v. Abdul Johari bin Abdul Rahman [1995] 1 AMR 761 ***(foll)***
Abdul Sali v. Najima Begum [1980] Cr. LJ 232 (All) ***(foll)***

Legistlation referred:
Criminal Procedure Code (F.M.S. Cap. 6), s. 388 (i)
Judicature Act, 1964 (Act 91), s. 20
Penal Code, ss. 302, 304

For the applicant - R.K. Menon; M/s. R.K. Menon & Co.
For the respondent - Azman Abdullah; DPP State Legal Adviser's Chambers, Johor Bahru

JUDGMENT

Abdul Malik Ishak J:

This was a miscellaneous criminal application in enclosure 2 accompanied by a notice of motion wherein the applicant sought for the following prayers:

(1) Satu tarikh yang awal ditetapkan untuk perbicaraan Mahkamah Tinggi Johor Bahru Perbicaraan Jenayah No. 45-7 tahun 1995;

(2) Jikalau didapati bahawa tidak dapat tarikh awal di Mahkamah Tinggi (1), maka kes berkenaan dipindah ke Mahkamah Tinggi (2) untuk mendapatkan tarikh awal di situ;

(3) Sekiranya tidak ada tarikh awal di Mahkamah Tinggi (2) juga, maka kes berkenaan dipindah ke Mahkamah Tinggi (3) untuk mendapatkan satu tarikh awal daripada Mahkamah Tinggi (3);

(4) Lain-lain Perintah atau Perintah-Perintah yang Mahkamah mulia ini dapati sesuai dan adil.

There are four observations to be made. Firstly, there are three High Courts of Malaya comprised in Johore particularly Johor Bahru manned by three resident High Court Judges. The senior resident High Court Judge will be in charge of the High Court no. (1). That is the privilege accorded to him. The next senior High Court Judge will control and take charge of the High Court no. (2), while the junior and not necessarily the youngest, will be in charge of the High Court no. (3).

That would be the hierarchy of the three High Courts of Malaya at Johor Bahru. For convenience, the three resident High Court Judges will be referred to as J1, J2 and J3 having regard to their seniority and to the High Courts of which they are in charge. Secondly, all businesses of the three High Courts are evenly distributed on equal basis dependant on the numbers alloted to these Courts and the registries would distribute the work load according to the numbers as pre-determined. To date, the registries have done a marvellous job and from time to time J1 will re-allot new numbers to the three High Courts. Thirdly, J1, J2 and J3 have no choice but to handle those cases distributed by the registries and whether those cases would be fixed for early hearings would in turn be dependant on the respective High Court Judges who would normally determine the hearing dates through their respective Deputy Registrars. Fourthly, I am J2 in charge of the High Court no. (2).

The applicant's father by the name of Chong Liow Meng affirmed an affidavit dated 13 April 1996 in enclosure 4 and there he narrated in great detail the facts in support of the application in enclosure 2. It was deposed that the applicant was arrested on 16 February 1995 for alleged involvement in a murder case that took place in an area along Jalan Tanah Merah, Kampong Semai Subur, Tasek Utara, Johor Bahru. Two other Chinese youngsters were said to be involved and they too were arrested and detained. The applicant together with the other two Chinese youngsters were duly produced before the Magistrate's Court, Johor Bahru vide Magistrate's Court Johor Bahru Case no. A81-1- of 1995 on several occasions, namely, on 27 February 1995, 20 April 1995, 20 May 1995, 5 June 1995 and finally on 12 June 1995 when the case was finally transmitted to the High Court no. (1) *vide* Criminal Trial no. 45-7-95 without the necessity of a preliminary inquiry. The committal proceedings against the applicant and the two other Chinese youngsters showed the following tentative charge:

> Bahawa kamu bersama-sama pada 15.2.95 jam lebih kurang 1.15 petang, di kawasan Jalan Tanah Merah, Kampong Semai Subur, Tasek Utara, di dalam daerah Johor Bahru, di dalam Negeri Johor dan dengan niat bersama telah melakukan kesalahan bunuh dengan menyebabkan kematian Liew Chin Liu K/P.A3964769(B), dan dengan demikian kamu telah melakukan satu kesalahan yang boleh dihukum dibawah seksyen 302 Kanun Keseksaan (F.M.S Cap. 45) di baca bersama-sama dengan seksyen 34 Kanun yang sama.

Bail was denied not only to the applicant but also to the other two Chinese youngsters. The applicant was born on 21 March 1977 and, consequently, when he was arrested on 16 February 1995 he was barely 17 years 10 months 25 days. Under the First Schedule to the Criminal Procedure Code (F.M.S. Cap.6) an offence of murder of which the applicant is subjected to is classified as non-bailable. In *King Emperor v. Abhairaj Kunwar* [1940] A.I.R. Oudh 8; 40 Cr. L.J. 841 it was held that in a murder case, where there are *prima facie* grounds for believing that the accused has committed the offence which is punishable with death or with imprisonment for life, the accused should not be released on bail. Under s. 388 (i) of the Criminal Procedure Code (F.M.S. Cap. 6) the applicant is not entitled to be released on bail and this prompted Mr. R.K. Menon, the learned Counsel for the applicant, to advance an argument that continued detention in the Johor Bahru prison would probably result in the applicant coming into contact with hardened criminals who have been incarcerated there. It was emphasised that the applicant was studying in Form 5 in Sekolah Menengah Tasek Utara, Jalan Tun Abdul Razak Susur 7, Johor Bahru and that as a keen student he was particularly interested in pursuing his studies. The learned Deputy Public Prosecutor in the person of Mr. Azman Abdullah took exception and he strenously argued at the bar that he had evidence to show that the applicant was not a keen student; that there were teachers at the school who witnessed the incident and without affidavits from these teachers, this Court was deprived of the opportunity to ascertain whether

the applicant was indeed a studious pupil. Nevertheless the applicant's father deposed further in the affidavit that he had instructed his solicitors to write to J1 to seek an early date for the hearing of the applicant's case. Thus, by letter dated 23 January 1996, Mr. R.K. Menon wrote a long passionate letter to J1 begging for an early hearing date for the applicant as the applicant's father was apprehensive that at a later stage when the case finally came up for hearing and after the applicant had been detained for a prolonged period, the prosecution may decide to tender an amended charge under s. 304 of the Penal Code. In that letter to J1, Mr. R.K. Menon drove home a point that continued incarceration of the applicant pending trial would be disastrous in that the applicant may absorb all sorts of undesirable habits and negative values. J1's Senior Assistant Registrar ("SAR") by letter dated 31 January 1996 as exhibited in exhibit "CLM 4" in enclosure 4 replied to Mr. R.K. Menon's letter as adverted to earlier and for convenience the SAR's reply is reproduced hereinunder:

PEJABAT PENDAFTARAN,
MAHKAMAH TINGGI,
80000 JOHOR BAHRU.

Telefon : 07-2230024

Ruj.Kami: 45-7-95
Tarikh: 31 Januari, 1996

Tetuan R.K. Menon & Co.,
Peguambela & Peguamcara,
Rooms 5,6, & 7, 6th Floor,
Foh Chong Building,
Jalan Ibrahim,
80000 JOHOR BAHRU.

Tuan,

Per: Mahkamah Tinggi Johor Bahru
Perbicaraan Jenayah No: 45-7-95

Kami merujuk kepada perkara di atas dan surat daripada pihak tuan bertarikh 23.1.96.

2. Atas arahan; pihak tuan adalah diminta supaya berhubung dengan pihak Pendakwaraya Negeri Johor terlebih dahulu mengenai kes ini.

3. Pihak Mahkamah tidak dapat menetapkan tarikh bicara yang awal melainkan pihak Pendakwaraya Negeri Johor menyatakan persetujuannya untuk meminda pertuduhan ke atas section 304 Kanun Kesiksaan atau tidak.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

(Sgd)

(JAILANI BIN RAHMAN)
Penolong Kanan Pendaftar,
Mahkamah Tinggi,
JOHOR BAHRU.

J1's SAR's letter revealed two things. Firstly, Mr. R.K. Menon was advised to revert to the Deputy Public Prosecutor in regard to the case (Criminal Trial no. 45-7-95). Secondly, J1's Court was not able to fix an early trial for the case (Criminal Trial no. 45-7-95) unless the Deputy Public Prosecutor agreed to amend the charge to s. 304 of the Penal Code. There was no mention at all in the SAR's letter that J1's Court had other outstanding criminal cases pending. But the applicant's father at paragraph 14 of his affidavit in enclosure 4 deposed, *inter alia*, that:

> Saya diberitahu oleh peguam saya bahawa Mahkamah Tinggi (1) Johor Bahru ada banyak kes untuk dibicarakan dan kes-kes ini telah pun didaftarkan terlebih awal apabila dibandingkan dengan kes terhadap anak saya.

Now, to recapitulate the prayers in the notice of motion in enclosure 2 filed under the guise of Miscellaneous Criminal Application sought for:

(1) an early trial for the applicant's case (Criminal Trial no. 45-7-95) - a case scheduled and slotted before J1;

(2) if J1 could not give an early trial the case to be transferred to J2;

(3) if J2 could not give an early trial the case to be transferred to J3; and

(4) any other directions or orders as the Honourable Court deem fit to grant.

Am I supposed to accede to the applicant's application? Mr. Azman Abdullah, the learned deputy public prosecutor, argued quite rightly that I am not supposed to encroach into the territory of J1, so to speak. I hasten to add, neither do I have the inclination to encroach into J3's territory, so to speak. It is germane to mention here that I, too, do not have the power to transfer Criminal Trial No. 45-7-95 to J3's Court. The pertinent question to ask is this: Why must this application be filed in my Court? Is it because I have disposed of all my criminal cases that prompted this application to be filed in my Court? Section 20 of the Courts of Judicature Act, 1964 (Act 91) ("Act") enacts that:

> The distribution of business among Judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

A "Chief Judge" is defined under s. 3 of the Act to mean the Chief Judge of the High Court in Malaya. In my opinion s. 20 of the Act gives an absolute power to the Chief Judge to distribute "business" among Judges of the High Courts in accordance with the directions which he may give of a general or particular nature. The word "business" employed in the context of s. 20 of the Act must necessarily refer to the "cases" filed before the High Courts as the hearing of such cases are the only "business" conducted by these High Courts. It is a correct approach to adopt when construing an Act of Parliament by construing the intention as expressed in the Act itself. Put differently, it is appropriate to say that the function of the Court is to interpret an Act "according to the intent of them that made it" and the intention must be deduced from the language used: per Parker CJ in *Capper v. Baldwin* [1965] 2 QB 53, 61. In my judgment the words employed in s. 20 of the Act are by themselves precise and unambiguous and, consequently, my job is simply to expound those words in the ordinary and natural sense. As Lord Goddard CJ once said in *Barnes v. Jarvis* [1953] 1 WLR 649 (DC):

> A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.

There is a string of authorities which say that "where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences for in that case the words of the statute speak the intention of the legislature" (*Warburton v. Loveland* [1832] 2 D & C (HL) 480, 489; *Attorney-General v. Sillem* [1864] 2 H & C 431, 510; *Attorney-General v. Noyes* [1881] 8 QBD 125, 139; *Hornsey LB v. Monarch Investment Building Society* [1889] 24 QBD 1; *M'Cowan v. Baine* [1891] AC 401, 409; *Salomon v. Salomon* [1897] AC 22, 38; *Sutters v. Briggs* [1922] AC 1, 8; *IRC v. Collco Dealings, Same v. Lucbor Dealings* [1959] 1 WLR 995; and *Gluchowska v. Tottenham Borough Council* [1954] 1 QB 439 (DC)), and, consequently, in construing s. 20 of the Act, I arrived at the inescapable conclusion that only the Chief Judge could direct me to take and dispose of Criminal Trial No: 45-7-95 from J1 and without the Chief Judge's direction on this point, I will not encroach into J1's territory, so to speak. For fear of repetition, I lay stress on the fact that the Chief Judge has that overriding power and it is also his prerogative to transfer Criminal Trial No: 45-7-95 to J3. I have no powers of the like nature. Accordingly, I refused to grant the prayers in enclosure 2.

But that is not the end of the matter. Mr. Azman Abdullah next argued with vigour and vitality that if I were to accede to the prayers in enclosure 2 especially prayers (1) and (2), the floodgates would be opened wherein prisoners awaiting trials before J1 and J3 would proceed to apply to have their cases transferred to my Court in their endeavours to obtain early trial dates. There is merit in this argument. Why should I be saddled with the cases from J1 and J3 unless the Chief Judge under s. 20 of the Act directed me to do

so? All High Court Judges receive the same salaries, perks and entitlements and they should perform at optimum levels. In the administration of the law it is often too tempting to seek escape from the burden of listening to a case, be it civil or criminal. If such an attitude prevails, then the Courts would fail to serve as an instrument of law and order. It would fail to meet the problems of contemporary society. In my considered view, the Courts must aspire at certainty, at justice, at progressiveness, at steadfastness. That would be possible if Judges adjudicate cases speedily and judiciously. Be that as it may, every non-bailable prisoner expects an early trial. To be castrated in prison for slightly more than one year must be an ordeal. More so in the case of the applicant who was a juvenile at the time of his arrest. It saps the strength of even the strong among us. In this context, I am not unmindful of the words of their Lordships of the Indian Supreme Court in *AK Gopalan v. The State of Madras* [1950] AIR SC 27 especially the words of BK Mukherjea J, and, I reproduce those words as it merit reproduction:

> There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights, as was observed by the Supreme Court of America in *Jacobson v. Massachusetts*, (197 US 11), are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. The question, therefore, arises in each case of adjusting the conflicting interests of the individual and of the society. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interests of the society; on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand for the very protection of these liberties the society must arm itself with certain powers. No man's liberty would be worth its name if it can be violated with impunity by any wrongdoer and if his property or possessions could be prayed upon by a thief or a marauder. The society, therefore, has got to exercise certain powers for the protection of these liberties and to arrest, search, imprison and punish those who break the law. If these powers are properly exercised, they themselves are the safeguards of freedom, but they can certainly be abused. The police may arrest any man and throw him into prison without assigning any reasons; they may search his belongings on the slightest pretext; he may be subjected to a sham trial and even punished for crimes unknown to law. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

In another part of the same judgment, B.K. Mukherjea J continued in serious vein:

> The right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birth rights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of 'freedom' to do particular things.

In *Bird v. Jones* [1872] 7 QB 742; 15 LJ QB 82, Coleridge J said that "it is one part of the definition of freedom to be able to go whithersoever one pleases."

The Courts must therefore strike a balance to ensure that non-bailable prisoners who have had their freedom curtailed for the good of society should not linger for too long a time in prison while awaiting for trials. If these non-bailable prisoners are not found guilty later on after undergoing trials, it would surely be a waste of public funds to incarcerate them. Early trials would ensure justice be meted out to the non-bailable prisoners and, consequently, reduce the overcongested prisons throughout the country. Be that as it may, Mr. Azman Abdullah further argued and drew my attention for the failure of Mr. R.K. Menon to cite the sections of the law in the intitulement to the miscellaneous criminal application in enclosure 2. Just like originating summonses that have to be intituled, so too would Miscellaneous Criminal Applications. By way of an analogy Gopal Sri Ram JCA in *Cheow Chew Khoon @ Teoh Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 1 AMR 761 spoke of the mandatory requirement for an originating summons to be intituled:

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support one would come to the conclusion that it is not an application made under O. 89. The summons does not, as I observed very early in this judgment, state any particular Rule of Court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the Court to determine which Rule of Court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the Court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the Court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not. In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the Court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or Rule of Court under which the Court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

In rebuttal Mr. R.K. Menon argued that this Court have the inherent powers to deal summarily with this Miscellaneous Criminal Application. I beg to disagree. In *Abdul Sali v. Najima Begum* [1980] Cr. LJ 232 (All) it was held that the inherent powers of the High Court cannot be exercised to override or circumvent the express provisions of law. Applying *Abdul Sali*, I am constrained to say that I cannot override or circumvent s. 20 of the Act and I am fully bound by it. For these reasons, I refused to grant the prayers as sought for in enclosure 2.

Reported by W.A. Sharif